VIII

That the shortest and most convenient route over which said automobiles so purchased as aforesaid may be driven or towed to California is through the State of New Mexico; that in order to avail himself of this short route it is necessary for him to drive or tow said automobiles upon and over the public highways of the State of New Mexico; that plaintiff enters said State of New Mexico at the City of Las Cruces and drives on the public highway to Lordsburg, a distance of approximately one hundred and eighty one miles; that the time it takes to drive said one hundred and eighty one miles is approximately six hours; that said route through the State of New Mexico is the shortest and most convenient route.

[fol. 7]

IX

That under and by virtue of the provisions of said Act of the State of New Mexico hereinabove mentioned, plaintiff has been required, by defendant, to pay to defendant, his agents, servants and employees, the sum of $7.50 for each vehicle driven by use of its own power and a fee of $5.00 for each vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power; that plaintiff has paid said money under duress and protest to said defendant, his agents, servants and employees; that there is no provision in the Act herein referred to or the Laws of the State of New Mexico whereby plaintiff can recover back said moneys so paid under duress and protest in the event said Act is held to be unconstitutional as to this plaintiff as hereinafter alleged;

X

That the distribution and disposition of the fees collected and to be collected from this plaintiff under the provisions of the foregoing statute are as provided in Section 1 of Chapter 93, Session Laws 1935, of the State of New Mexico, a copy of which said section is hereto attached, marked Exhibit "B" and made a part hereof.

XI

That said Act known as House Bill #71, Chapter 56, Session Laws of 1935 of the State of New Mexico is unconsti-

tutional upon the following grounds and for the following reasons, among others, to-wit:

(a) That said Act is in contravention of, and repugnant to Article I, Section 8 (commonly referred to as the "commerce clause") of the constitution of the United States, in this,

That said Act places a direct burden upon interstate commerce, and is not for the purpose of regulation but is a [fol. 8] revenue measure only;

That said Act is not based upon any reasonable basis of licensing, but is arbitrary, discriminatory and unfair and its effect is the burdening of business in interstate commerce and so intended to, does and will so cripple plaintiff's business in interstate commerce that it will be impossible for plaintiff to continue in said business;

That said Act is in no sense a police regulation of the use of the highways of the State for the protection of the health, morals or safety of the public.

(b) That said Act is in contravention of, and repugnant to the 14th amendment to the Constitution of the United States, in this;

That it deprives this plaintiff of his property, to-wit: moneys he is required to pay for use of the public highways of the State of New Mexico, without due process of law;

That it denies to this plaintiff, when engaged in interstate commerce in the State of New Mexico, as aforesaid, of the equal protection of the law;

That said Act is discriminatory in that it applies only to out of state dealers and does not apply to dealers within the State of New Mexico;

That it applies only to those persons, firms or corporations using the highways for transportation of motor vehicles for purposes of sale and does not apply to other persons using said highways for pleasure or purposes other than sale, which distinction and classification is not reasonable.

That said license tax is wholly disproportionate to other taxes, fees or other licenses charged by the State of New Mexico either for the registration of vehicles in said state or for vehicles using the highways in said state.

That said license tax is exorbitant and arbitrary and unfair to such a degree that the interstate business in which

[fol. 9] plaintiff is engaged in the State of New Mexico will return a revenue to said state in proportion, far in excess of other fees, licenses or taxes charged other persons for the use of the highways in said state.

XII

Plaintiff further states and alleges that he desires to continue to use the highways of the State of New Mexico for the purpose of transporting motor vehicles in interstate commerce as hereinbefore alleged and that the continued use of said highways is absolutely essential to the conduct and operation of plaintiff's business; that if he is denied the right to so use said highways or is charged and forced to pay an exorbitant and arbitrary fee for such use, he will be unable to continue in business and the effect will be the same as if he was arbitrarily denied the right to so use said highways.

XIII

Plaintiff further alleges and states that said defendant has heretofore required this plaintiff, when transporting his motor vehicles on its or their own wheels over and across the highways of the State of New Mexico, for the purpose of selling said motor vehicles in the State of California, to pay to said defendant, his agents, servants or employees the sum of $7.50 for each such vehicle transported by use of its own power and the sum of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by use of its own power, all as is contemplated by the provisions of said sub section (d) of Section I of Chapter 56 of the 1935 Session Laws of the State of New Mexico; that said defendant intends and threatens to continue to enforce, as against this plaintiff, the provisions of said statute and to require him to pay the said fees, charges and sums in said statute provided and herein last above set out; that said defendant intends and threatens to invoke as against this plaintiff, the penalties by the laws of said State of New Mexico prescribed for any [fol. 10] failure on the part of this plaintiff to pay the fees, charges and sums hereinabove mentioned for his use of the highways of said state in the manner and for the purposes above set forth, and to thereby deny to this plaintiff the use of said highways in his lawful interstate commerce as

aforesaid, unless he shall first pay to said defendant said fees and sums above mentioned; that there is no provision of law whereby and whereunder this plaintiff may recover from said defendant or from the State of New Mexico any such sums, fees or charges by him paid or to be paid said defendant as aforesaid; that if said defendant be permitted to carry out his aforesaid threats and intentions and to enforce as against this plaintiff the provisions of said statute and unless said defendant, his deputies, agents and servants be enjoined and restrained from so doing, this plaintiff and his aforesaid business will suffer irreparable loss and injury and the rights of this plaintiff in the premises and the protection to him guaranteed under the provisions of Section 8 of Article I and under the provisions of the 14th amendment to the Constitution of the United States will be violated, destroyed and held for naught.

That said plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays the Court:

I. For a temporary restraining of this Court directed to the said defendant, his agents, servants and employees and all persons acting under and through his authority as commissioner of revenue for the State of New Mexico, enjoining and restraining them and each of them from enforcing or attempting to enforce as against this plaintiff the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico.

II. For a citation directed to said defendant ordering him to appear before a three judge court at a time and place to be hereafter fixed by order of Court and there show cause, if any he has, why an interlocutory injunction [fol. 11] should not be issued herein as is by law and the practice of this Court contemplated.

III. For a final and permanent injunction upon hearing of the merits of this cause before a three judge court, finally and permanently enjoining and restraining the defendant, John D. Bingaman, as commissioner of revenue of the State of New Mexico, his agents, servants and employees and all other persons acting under or through his authority as such commissioner from enforcing or attempting to enforce as against this plaintiff the provisions of said Chapter 56 of

the 1935 Session Laws of the State of New Mexico, and from exacting or attempting to exact from this plaintiff the payment of any sums, charges or fees in said statute unlawfully required of him to be paid by reason of his aforesaid use and intended use of the highways of the State of New Mexico in the manner herein set out above.

IV. Said plaintiff prays for such other and further relief in the premises as to the Court may seem adequate, equitable and just.

Pierson & Block, by Ralph K. Pierson, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for plaintiff.

Duly sworn to by Ralph K. Pierson. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 56

An Act to Amend Chapter 139 of the Session Laws of 1933 Relating to Registration Fees for Motor Vehicles

House Bill No. 71; Approved February 21, 1935

Be it Eacted By the Legislature of the State of New Mexico:

Section 1. That chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(a) A non-resident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, county or other place for which the owner is a resident and which at all times when operated in this state had displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without [fol. 13] registering such vehicle or paying any fees to this state, during a period of three months from the time such vehicle is first brought into this state.

"(b) A non-resident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for the transportation of merchandise, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state; Provided, however, that motor vehicles properly licensed in any other state or country, operated for compensation or hire, which are used exclusively in the transportation of livestock, lumber, farm or dairy products, from the place of production to market, or in the transportation of a return load of livestock, farm or dairy products or lumber, may be allowed to make trips within the state and remain on each trip within the state not exceeding four days, without being registered or required to pay the mileage or other fees, in this state, in the event that under the laws of such other state or country, similar or like exceptions are granted to motor vehicles registered under the laws of and owned by residents of this state.

"(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state Provided, however, salesmen, agents or [fol. 14] representatives with no permanent place of business in this state and who are traveling through the State for the purpose of calling on retailers, wholesalers or jobbers for the purpose of taking orders for future delivery, shall be required to register any motor vehicle used by them in such business and pay therefor a registration fee of Five ($5.00) Dollars, for which an appropriate license tax shall be furnished by the motor vehicle commissioner.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of Revenue of the State of New Mexico upon application on such forms as said commissioner may prescribe [fol. 15] and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificates, issued by said Commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

Section 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

[fol. 16] SUBSTITUTED EXHIBIT "B" TO BILL OF COMPLAINT

Chapter 93

An Act Amending Section 11-311 of New Mexico Statutes, Annotated, 1929 Compilation as Amended by Section 6, Chapter 169 of the Laws of New Mexico of 1933 Which Amended Section 6, Chapter 77 of the Laws of New Mexico of 1931, Relating to the Disposition of Registration Fees, Collected upon the Registration of Motor Vehicles.

House Bill No. 17; Approved February 25, 1935

Be it enacted by the Legislature of the State of New Mexico;

Section 1. That Section 11-311 of the New Mexico Statutes, Annotated, 1929 Compilation, otherwise known and designated as Section 31 of Chapter 119 of the Laws of 1929 as amended by Section 6 of Chapter 77 of the Laws of 1931 and as further amended by Section 6 of Chapter [fol. 17] 169 of the Laws of 1933, be and the same is hereby amended to read as follows:

11-311. Disposition of Fees.

The fees collected under the provisions of this Act shall be paid over to the state treasurer not later than the close of the second business day after their receipt. Not to exceed Six per cent thereof shall be covered into the state comptroller motor vehicle fund, and used to defray the expense of the administration and enforcement of this Act and the discharge of such other duties as may be imposed upon the department by law. The remainder thereof shall be distributed by the state treasurer on or before the tenth day of the month next after their receipt, as follows:

Forty-five per cent thereof shall be placed to the credit of the state road fund to be used and disbursed as other moneys in the state road fund.

Fifteen per cent thereof shall be paid to the county treasurers of the several counties in this state and distributed between the respective counties in proportion that the total amount of registration fees paid for motor vehicles each

county bears to the total amount of such registration fees paid for such vehicles owned in the state, to be credited to the county road fund of said respective counties, and used for the improvement and maintenance of the public roads therein, and to pay for the acquisition of rights of way and [fol. 18] material pits at the request of and by agreement with the state highway commission.

Fifteen per cent thereof shall be credited to the state general fund.

Twenty-five per cent thereof shall be paid over to the county treasurer of the several counties of this state and distributed between said respective counties in the proportion that the total amount of registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state, and the county treasurer of each county shall distribute the moneys paid to him under the provisions of this paragraph, when received, between the county and school district funds of such county and the various cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, received by said treasurer for the year in which such distribution is to be made, are so distributed in such county betwen said county and school district funds and said cities, towns and villages therein. Provided that in the counties wherein are located cities, towns or villages incorporated, organized and operating under special act, the country treasurer of such county shall pay to the treasurers of said cities, towns or villages a proportionate amount of said money, by him to be distributed in the proportion that the receipts from general property taxes in said cities, towns or villages, bear to the total receipts from general property taxes other than taxes for state purposes received by the county treasurers and the collectors of said cities, towns or villages in the year in which said distribution is to be made. And Provided further [fol. 19] that for the purpose of effecting an equitable distribution in said counties, the collectors of said cities, towns or villages operating under special act shall, on or before the first Monday in October, certify to the county treasurer and to the state tax commission, the assessed valuation and the total tax rate in said cities, towns or villages for such year. The remainder thereof shall be credited to the State Public School Equalization Fund.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed December 24, 1935, Nunc Pro Tunc as of September 13, 1935.

Comes now the plaintiff, and by and under the consent of the defendant in open court granted and by leave of Court first had and obtained, hereby amends his Bill of Complaint in the following particulars, to-wit:

I

That sub-paragraph (b) of Paragraph XI of his said complaint be and the same is hereby amended to read as follows: that said Act is in contravention of and repugnant to the Fourteenth Amendment of the Constitution of the United States in this: that the said defendant and the Port of Entry Board, created, organized, and existing under the provisions of Chapter 136 of the 1935 Session Laws of the State of New Mexico, and their respective agents, servants, and employees, deprive this Plaintiff of his property, to-wit: monies he is required to pay under the provisions of Chapter 56 of the 1935 Session Laws of [fol. 20] the State of New Mexico, without due process of law.

That said Plaintiff, by reason of the premises, is likewise deprived of his property without due process of law in this: that said defendant in enforcing and attempting to enforce as against this plaintiff the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico, is denying unto this plaintiff the right to pay the mileage tax upon the motor vehicles by him driven or caused to be driven through and across the State of New Mexico, which mileage tax is provided for in Sections 6 and 8 of what is commonly called the Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the State of New Mexico, and is further denying to him the right to elect to register his said vehicles with the Bureau of Revenue and to pay the fees required for licensing of said vehicles or to pay the mileage tax provided for in Section 8 of said Port of Entry Act. That said defendant in enforcing and seeking to enforce the provisions of Chapter 56 of the 1935 Session Laws of the State of New Mexico is further depriving this Plaintiff of his properties without due process of law in this: that the provisions of said

Chapter 56 are repugnant to and are repealed by the provisions of the said Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the State of New Mexico.

That it denies to this plaintiff, when engaged in Interstate Commerce in the State of New Mexico as aforesaid the equal protection of the law for each and every reason last above in this sub-paragraph set forth; and for the further reason that it denies to this plaintiff the right to elect to pay a tax under the terms of the said Port of Entry Act, as herein above set forth, which right is accorded to [fol. 21] other persons, firms and corporations coming within the provisions of the said Port of Entry Act, as does this Plaintiff

II.

That a new paragraph to be numbered XII B be added to said Bill of Complaint as follows, to-wit: that under and in accord with the provisions of Chapter 136 of the 1935 Session Laws of the State of New Mexico, approved on the 28th day of February, 1935, which said act is a later enactment of the legislature of said State than is Chapter 56 of the 1935 Session Laws of the State of New Mexico approved on the 21st day of February, 1935, this plaintiff is and should be accorded the right and privilege of using the highways of the State of New Mexico in and for his aforementioned interstate commerce business by complying with the provisions of said chapter in and upon payment of the mileage tax in said chapter provided and required to be paid by those who are or may use said highways in Interstate Commerce of the kind and character carried on by this plaintiff as aforesaid; that by reason of the character of the aforesaid business of this plaintiff and the character of business of his use of the highways of New Mexico this plaintiff falls within the classification of said chapter 136, commonly called the Port of Entry Act, and has the lawful right and authority under said act to use said highways for the purposes aforesaid upon payment of mileage tax and further has the lawful right and authority to elect to pay the mileage tax in said Chapter required of him to be paid or to register each of the motor vehicles by him transported or to be transported in the State of New Mexico on the highways thereof with the Bureau of Revenue upon the payment of fees for his license

plates for each of said vehicles and he further states that this right is to him denied by the said defendant and his agents, servants and employees

That said defendant has refused to permit this plaintiff to use the highways of the State of New Mexico for the [fol. 22] purposes aforesaid, upon complying with the provisions of said Chapter 136 of the 1935 Session Laws of the State of New Mexico, but has compelled and threatens to and will continue to compel this plaintiff as a prerequisite to using the highways of New Mexico for the purposes aforesaid to comply with the provisions of said Chapter 56 of the 1935 Session Laws of the State of New Mexico and to pay fees therein provided.

That said Chapter 56 of the 1935 Session Laws of the State of New Mexico, as the same effects the payment of fees by this plaintiff for his aforesaid use of the highways of said State is contrary to and repugnant to and is repealed by the provisions of the said Port of Entry Act, to-wit: Chapter 136 of the 1935 Session Laws of the said State.

Pierson & Block, by Ralph K. Pierson, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER—Filed August 23, 1935

It is hereby stipulated by and between Frank H. Patton, Attorney General and Quincy D. Adams, Assistant Attorney General of the State of New Mexico, whose appearance is hereby entered in this cause for and in behalf of the defendant herein, and Pierson & Block and George E. Remley, attorneys of record for the above named plaintiff as follows, to-wit:

[fol. 23] That upon the bill in equity in this cause filed a Temporary Restraining Order may be forthwith entered herein restraining and enjoining the said defendant as prayed for in said bill in equity until the hearing on plaintiff's application for an Interloctutory Injunction shall be had.

It is further stipulated that such Temporary Restraining Order shall issue out of said Court upon the filing herein of the plaintiff's bond in manner and form by law required in the sum of $1500.00, provided, however, that said Temporary Restraining Order shall be in force and effect only during the period of time the bond herein mentioned is sufficient to cover the fees of the State of New Mexico which it would be entitled to collect except for said Temporary Restraining Order and that during the time said bond is not sufficient to cover such fees said Temporary Restraining Order shall be suspended and of no force and effect until such time as plaintiff herein files a sufficient additional bond, at which time said Temporary Restraining Order shall continue to be in full force and effect; and

It is further stipulated that the hearing upon plaintiff's application for Interlocutory Injunction may be heard between the 15th day of September, 1935 and the 15th day of October, 1935.

It is further stipulated that defendant may have to and including September 10th, 1935 to file his return to order to show cause and plead to plaintiff's bill.

Dated at Santa Fe, New Mexico, this 23rd day of August, 1935.

Pierson & Block, by Ralph K. Pierson, Geo. E. Remley, Attorneys for Plaintiff. Frank H. Patton, Attorney General for the State of New Mexico, by Quincy D. Adams, Assistant Attorney General for [fol. 24] the State of New Mexico, Attorneys for Defendant.

In United States District Court

Temporary Restraining Order and Rule to Show Cause—Filed August 23, 1935

And now, to-wit, on this 23 day of August, 1935, this cause coming on to be heard before the Honorable Colin Neblett, Judge of the United States Court for the District of New Mexico at Santa Fe in said District upon the bill in equity by the plaintiff herein filed and upon the stipulation of the attorneys record for said plaintiff and for said defendant and it appearing to the Court from said bill and from said stipulation that a Temporary Restraining Order should issue out of this Court in this cause.

Now therefore it is ordered, considered, adjudged and decreed by this court as follows, to-wit:

That the defendant, John D. Bingaman in his capacity as Commissioner of Revenue for the State of New Mexico and his agents, servants and employees and all other persons acting under and through his authority or by virtue of his said office, be and they hereby are severally enjoined and restrained specially and until the hearing on plaintiff's application for an Interlocutory Injunction, from the enforcement of the provisions of House Bill #71, Chapter 56 Sessions Laws of 1935 of the State of New Mexico, as against the plaintiff herein.

It is further ordered that plaintiff herein file his bond in the sum of $1500.00; and

It is further ordered that said Temporary Restraining [fol. 25] Order shall be in full force and effect only during the period of time the bond herein mentioned is sufficient to cover the fees of the State of New Mexico, which it would be entitled to collect except for the issuance of this Temporary Restraining Order; and that during the time said bond is not sufficient said Temporary Restraining Order shall be suspended and of no force and effect until such time as plaintiff herein files a sufficient additional bond to cover said fees at which time said Temporary Restraining Order shall be restored and continue in full force and effect. Said bond or bonds shall be in the form and upon the conditions required by law.

It is further ordered that defendant herein appear before a three judge court consisting of three United States Judges, one of whom shall be a Circuit Judge, sitting to hear this matter at the United States Court House, Albuquerque, New Mexico, on the date to be set by Court, and then and there to show cause, if any he has, why an Interlocutory Injunction should not issue herein.

It is further ordered that a copy of this order be served on the defendant, John D. Bingaman, and that at least five days notice of the hearing aforesaid be given respectively to the Governor and Attorney General of the State of New Mexico and to said defendant.

Dated at Santa Fe, New Mexico, this 23rd day of August, 1935.

Colin Neblett, District Judge.

OK. QDA.

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[fols. 26 & 27] IN THE UNITED STATES DISTRICT COURT

SUBPŒNA IN EQUITY—Issued August 23, 1935 and Filed August 26, 1935

The President of the United States of America to John D. Bingaman, Commissioner of Revenue for the State of New Mexico, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the District of New Mexico, at Santa Fe to answer unto the bill of complaint of Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Colin Neblett United States District Judge at Santa Fe this 23rd day of August A. D. 1935.

[illegible] D. Bryars, Clerk.

Memorandum

The Defendant in this case is required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Copy of Complaint attached.

Pierson & Block, Esquires, Compton, California; and Geo. E. Remley, Esquire, Santa Fe, New Mexico, Attorneys for Plaintiff.

[fol. 28] IN UNITED STATES DISTRICT COURT

ACCEPTANCE OF SERVICE OF SUBPŒNA AND ENTRY OF APPEARANCE—Filed August 26, 1935

John D. Bingaman, the duly appointed, qualified and acting Commissioner of Revenue for the State of New Mexico, defendant in the above entitled cause, and Frank H. Patton, Attorney General of the State of New Mexico, do each

hereby severally acknowledge service of subpœna in the above entitled cause and that they and each of them have this day received a true and correct copy of the bill in equity and of the temporary restraining order issued out of the above entitled cause on this day, and the said Frank H. Patton, Attorney General as aforesaid, and Quincy D. Adams, his assistant do hereby enter their appearance as attorneys of record for and in behalf of the said defendant herein.

Dated this 23rd day of August, 1935.

Frank H. Patton, Attorney General. Quincy D. Adams, Assistant Attorney General. John D. Bingaman, Commissioner of Revenue.

IN UNITED STATES DISTRICT COURT

RETURN TO THE RULE TO SHOW CAUSE AND ANSWER OF JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, ETC.—Filed September 10, 1935

Now comes John D. Bingaman, Commissioner of Revenue for the State of New Mexico, defendant in the above entitled cause, and for return to the rule and order to show cause, and for answer to plaintiff's complaint, alleges:

[fol. 29]

I

As to the allegations of Paragraph I of plaintiff's bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph, except that he admits that the plaintiff is a resident and citizen of the city of Los Angeles, county of Los Angeles, State of California, and that the defendant, John D. Bingaman, is the duly appointed, qualified and acting Commissioner of Revenue for the State of New Mexico, and is a resident of such state.

II

He denies the allegations of Paragraph II.

III

He admits the allegations of Paragraph III.

IV

He admits the allegations of Paragraph IV.

V

As to the allegations of Paragraph V of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said pargraph.

VI

As to the allegations of Paragraph VI of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

VII

As to the allegations of Paragraph VII of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

[fol. 30]

VIII

As to the allegations of Paragraph VIII of the bill of complaint, defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

IX

Defendant admits the allegations of Paragraph IX.

X

Defendant denies the allegations of Paragraph X.

XI

Defendant denies the allegations of Paragraph XI.

XII

As to the allegations of Paragraph XII, the defendant says that he has no knowledge concerning the same, and therefore denies each and every allegation contained in said paragraph.

XIII

Answering the allegations of Paragraph XIII, defendant admits the same, except that defendant denies that if the defendant carries out the threats and intentions referred to in said bill of complaint, and enforces the same against the plaintiff, that the plaintiff and the plaintiff's business will suffer irreparable loss and injury, and further denies that the rights of the plaintiff in the business carried on by the plaintiff will be violated, destroyed and/or held for naught, or that plaintiff will be denied the protection guaranteed to him under the provisions of Section 8 of Article I and/or under the provisions of the Fourteenth Amendment to the Constitution of the United States, and further denies that the plaintiff has no plain, speedy or adequate remedy at law.

XIV

As and for a further return to said order to show cause, and by way of answer to plaintiff's complaint, the defendant states that the bill of complaint herein does not state facts [fol. 31] sufficient to entitle the plaintiff to the relief therein prayed for, nor to any equitable relief.

XV

This Court has no jurisdiction of this cause because the specific facts set forth in the bill of complaint negative the conclusion therein set forth that this suit involves more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs; and it appears from the face of the bill of complaint that the requisite jurisdictional amount is not involved in this suit.

XVI

The plaintiff is not entitled to a temporary injunction herein, to the relief prayed for in plaintiff's bill of complaint, nor to any equitable relief because said bill of complaint does not allege or set forth any facts;

(a) Showing any deprivation of the rights of the property of the plaintiff.

(b) Showing any imposition of any burden on interstate commerce.

(c) Showing any discrimination as between out of state dealers in automobiles and local dealers in automobiles.

XVII

As and for further return to plaintiff's complaint, and by way of further answer thereto, the defendant states that the regulation and charge complained of by plaintiff is not a regulation of or charge made by the state for the transportation of motor vehicles in or across the state, but is a regulation of and charge made for the use of the public highways of the state of New Mexico for that purpose. Defendant further states that the public highways are the property of the state of New Mexico and have been built and are being maintained at a great expense to the said state of New Mexico; that such highways are a valuable facility and that the use of such highways is a valuable privilege; that the use of such facilities as regulated by [fol. 32] said Chapter 56 is a commercial, extraordinary use and that when the highways of the state are so used they are used for direct gain or profit and as a place of business for those engaged in the operations regulated by said Chapter 56; and that the use of such highways as described by plaintiff is of substantial value to the said plaintiff.

XVIII

Defendant further states that the highways of the state of New Mexico, and particularly the highway described in plaintiff's complaint, are regularly and customarily traversed at all hours of the day and night by great number of motor vehicles of every description and by other vehicles and that additional traffic upon such highways adds to and increases the wear of the same and the cost and expense of maintaining them, increases the hazards incident to such use, and increases the cost of supervising and regulating the traffic thereon and that the operations carried on by plaintiff as described in plaintiff's complaint, and by others similarly affected by such Chapter 56, are substantial and involve the movement of a great many motor vehicles and result in a great and substantial volume of such additional traffic.

XIX

That the operations of plaintiff as described by his complaint herein and by others affected by said Chapter 56 are of unusual and dangerous character in that vehicles so moved are customarily and ordinarily moved in long

processions or caravans, that by the use of tow bars or similar attachments the vehicles so moved are usually operated in tandem or in pairs, one car operated by a driver and pulling another driverless car, that such two car units are frequently operated with minimum or inadequate space between them and at varying speeds, the speed of such trains being uniformly slower than the ordinary stream of traffic on inclining grades and frequently on [fol. 33] level roads and frequently at excessive speeds when being moved down grade; that such cars so transported are usually ordinary passenger cars equipped with motive power and brakes originally designed to propel or restrain only one vehicle and that the speed, pickup and braking efficiency of such cars is usually impaired or reduced by the coupling and pulling of one car by another of such cars; that the coupling of such cars usually results in the impaired vision of the driver of the towing car in the rear view mirror; that the close coupling of such cars and their operation in trains makes it difficult for those overtaking or about to pass such caravans to observe the drivers signals as to his intentions as to stopping or turning; that such cars are usually operated by a preponderance of persons as drivers who have no ownership or interest in the same and who are only concerned with securing their own transportation to California or other destination; that such drivers are usually inexperienced, not familiar with the vehicle or vehicles they are operating, not familiar with the highways over which they operate, not accustomed to steady driving and for distances as great as those usually negotiated by such caravans; that only a small percentage of such drivers are paid for their services except in the form of the transportation of their persons to destination; that they are frequently underfed and have been driving or continue to drive such cars for excessively long and strenuous hours upon entering and upon continuing through the state.

XX

That the plaintiff is engaged exclusively in handling used cars or vehicles which have previously been owned by and frequently those which have been operated for many miles by others, and those which have been registered under the laws of some other state; that in order to prevent traffic

in stolen automobiles and to minimize the theft of automo- [fol. 34] biles it is essential and necessary for officials of the state of New Mexico to carefully scrutinize and devote special effort to the traffic in and movement over the highways of such used cars.

XXI

That in order to protect the residents of the state of New Mexico and others of the state in their use of the public highways and to provide for their safety and convenience in such use, and in order to regulate, supervise and control the operations over the public highways by the plaintiff and by others regulated by paragraph (d) of said Chapter 56, it is necessary for the state to maintain a state highway patrol or police force, the maintenance of which is accomplished at a substantial expense to the state of New Mexico.

XXII

That in order to collect and attain efficiency in the uniform collection of the fees imposed under the provisions of said paragraph (d) of said Chapter 56, it is necessary for the state to maintain officers, agents and clerks and to furnish supplies and materials at a material and substantial expense to the state of New Mexico.

XXIII

That in order to protect the safety and convenience of residents of the state and those who use the public highways of the state, and to deter motor vehicle operators from reckless driving upon such highways it is necessary for the state to require the registration and numbering of substantially all motor vehicles used on the public highways of the state for purposes of identification of those who operate such vehicles.

XXIV

That the provisions of paragraph (d) of said Chapter 56 are enacted under and constitute an exercise of both the police power of the state of New Mexico and its right to [fol. 35] exact a reasonable compensation for the use of the state's facilities, and that the fees exacted under such provisions are reasonable, fair and just, and bear a reason-

able relationship to the cost of such regulations and the expense of collecting such fees and to the value of the use of such facilities by the plaintiff and by others affected by the provisions of such paragraph.

XXV

That persons, firms and corporations licensed to do business as dealers under and by virtue of the laws of New Mexico, are, pursuant to said statutes, assigned an identifying number and that plates bearing such number must, by the provisions of said laws, be affixed to all motor vehicles operated over the highways of the state by each of such dealers and that each of such dealers must at all times keep an accurate record of the vehicles upon which each of such plates is used and that such records must be kept within the state and must be, at all times, available for inspection by proper officers or officials of the state. That because of the nature of the business conducted by automobile dealers and particularly the business conducted by dealers in used cars, it is essential and necessary that motor vehicles operated by them, their agents, employees and prospective purchasers, be easily and accurately identified in order to protect the safety and welfare of the residents of New Mexico and others who use the state's highways but that without the provisions of paragraph (d) of Chapter 56 aforesaid, the state has no practical means of identifying vehicles owned and operated on New Mexico highways by dealers not licensed by the state of New Mexico and that the provisions of said paragraph of said Chapter are necessary to classify and to regulate and to identify such operations by non-resident as distinguished from resident dealers, and that the charge made therefor is reason-
[fol. 36] able and necessary to defray the cost of such registration and regulation and that such classification is valid and not discriminatory.

XXVI

That under and by virtue of the laws of the state of New Mexico, persons, firms and corporations engaging in business in New Mexico as dealers in motor vehicles as in said statutes defined, are obliged to and do pay to the state of New Mexico and its various subdivisions other taxes, fees and charges which are not charged against or collected

from such dealers who do not deal in motor vehicles in the state, and that the charge set forth in said paragraph (d) of said Chapter 56, even though it were not applicable to local dealers does not fall with disproportionate economic weight upon the plaintiff and others similarly situated and is not discriminatory.

XXVII

Further answering sub-paragraph (c) of paragraph IX of plaintiff's complaint, defendant specifically denies the statement therein made that said Act "applies only to out of state dealers and does not apply to local automobile dealers". Defendant states that said Act applies to and requires that all persons, regardless of residence or place of business, who move motor vehicles over the highways of New Mexico in a manner and way similar to that of plaintiff, and as described in plaintiff's complaint, must do so in conformity with the provisions of sub-paragraphs 1 or 3 of paragraph (d) of said House Bill No. 71. That sub-paragraph 2 of said paragraph (d) of said House Bill No. 71 does not confer upon automobile dealers licensed by the state of New Mexico the right to operate and move motor vehicles over the highways of New Mexico as does the plaintiff as described in plaintiff's complaint; that said sub-paragraph 2 only saves to said automobile dealers licensed by New Mexico the rights which they had by virtue of Sections 11-319 and 11-330 of the Code of New Mexico, [fol. 37] of operating motor vehicles for purposes of demonstration and sale only, prior to the enactment of said House Bill No. 71, and does not confer upon them any new or additional rights. Defendant therefore denies that said Act discriminates between out of state and local automobile dealers.

XXVIII

Further answering sub-paragraph (c) of paragraph IX of plaintiff's complaint, defendant states that the Attorney General of the state of New Mexico has construed and ruled in a written opinion that an automobile dealer duly licensed by the state of New Mexico under the provisions of Sections 11-319 and 11-330 of the Code of New Mexico, who desires to move motor vehicles over the highways of New Mexico in a manner and way similar to that described in plaintiff's complaint must comply with the provisions of

sub-paragraphs 1 or 3 of said House Bill No. 71 and obtain the licenses or permits therein required, a copy of which said opinion is hereto attached, marked "Exhibit A" and made a part hereof as though at this point fully set forth.

XXIX

That the use of the public highways for the transportation of motor vehicles on their own wheels for the purpose of selling or offering the same for sale to or by agents, dealers, purchasers or prospective purchasers is an extraordinary or special use which warrants the separate classification and treatment of those engaging in such movement.

XXX

That the business described in plaintiff's complaint and engaged in by plaintiff is primarily a transportation business by means of which plaintiff and others similarly engaged are enabled to purchase cars at places where prevailing markets are low, to move them over the highways in the manner described herein at low cost to places where [fol. 38] markets are high due to original transportation costs and to thus sell such vehicles at a profit in competition with other vehicles of identical kind, model, style, age and make which were not originally moved under their own power over the public highways. That automobiles, pursuant to a custom of the trade of many years standing are sold at nationally advertised prices "freight on board" Detroit, Michigan, or its immediate vicinity, plus railroad freight charges to place of sale and ultimate delivery; that the railroad transportation costs increase with the distance from Detroit and vicinity and that as a result vehicles originally sold at great distances away from Detroit and vicinity are sold new for substantially higher prices than those sold new at points much closer to Detroit and vicinity. That the original sale price of such vehicles has a proportional and direct relationship to the trade-in and resale value of used cars and that the used car market in such respective areas varies in about the same proportion. That principally, by reason of these facts, plaintiff and others similarly situated are able to buy cars in low markets and sell them below the usual price in such higher markets by reason of the inexpensive or low-cost method of moving them to such place of sale. That such vehicles are of the identi-

cal kind and quality of other vehicles available on such higher markets at such higher prices and that the principal ingredient placed in such cars by plaintiff and others engaged in such caravaning is the transportation in the manner herein described. That the caravaning of such cars is the principal portion of the business so engaged in and that the purchase at low markets and sale at higher markets is purely an incident to such business and that such caravaning is chiefly a transportation business and by its nature may be properly and separately classified and regulated as distinguished from ordinary highway use.

[fol. 39] Wherefore, defendant prays that the temporary restraining order be dissolved and the bill of complaint dismissed herein at plaintiff's costs.

Frank H. Patton, Attorney General; Quincy D. Adams, Assistant Attorney General, State of New Mexico, Attorneys for Defendant.

Duly sworn to by Quincy D. Adams. Jurat omitted in printing.

EXHIBIT "A" TO RETURN AND ANSWER

"September 6, 1935.

[fol. 40] Hon. John D. Bingaman, Commissioner of Revenue, Santa Fe, New Mexico

DEAR SIR:

This is in reply to your letter in which you ask our opinion upon the following question:

"What is the correct interpretation of that portion of paragraph (d) of Section 1, Chapter 56, Laws of 1935, purporting to exempt certain automobiles from the usual registration fee or a special permit and which reads that 'no person, firm or corporation shall use the highways * * * for the transportation of any motor vehicle on its own wheels for the purpose of selling, etc. * * * unless such motor vehicle * * *

2. Is owned by an automobile dealer duly licensed by the State of Mexico and is operated under a dealer's license duly issued to such dealer;'?"

The statute referred to by you is what is generally known to be the Auto Caravan Law. It requires that any motor vehicle being transported on its own wheels for the purpose of sale shall be licensed by the State of New Mexico or that a special permit be issued for the use of the highways in such manner, unless such motor vehicle be owned and operated as stated in sub-paragraph 2 above quoted.

Your difficulty seems to be in determining in just what cases the exception applies. At the time of the passage of Chapter 56, Laws of 1935, the only way in which automobile dealers could operate motor vehicles upon the public highways of this state, without their being registered in the usual manner, was by the use of demonstration plates, [fol. 41] provision for which is made in Section 11-319, Paragraph (a) and Section 11-330, 1929 Compilation. Section 11-330 reads as follows:

"11-330. Dealer's demonstration numbers. A dealer in motor vehicles may, in lieu of registering each vehicle he may wish to demonstrate on any highway apply for and secure a dealer's demonstration number, which he may use by attaching registration and number plates issued by the department to each vehicle so used for demonstration only, and not for hire or private use.

The annual registration fee to be paid by such dealer shall be $50.00, which shall entitle him to one pair of plates and he shall be required to pay $10.00 for each pair of extra plates he may use."

It will be noted that such license plates can be used only when the vehicle is being *'used for demonstration only and not for hire or private use.'* Of course it is common knowledge that the demonstration of motor vehicles is usually performed for the purpose of 'selling' or offering the same for sale.'

If paragraph (d) of Section 1 of Chapter 56, Laws of 1935, did not make an exception of such cases it would then be necessary for a dealer who wished to demonstrate a car to a prospective purchaser not only to secure demonstration plates but also to secure the ordinary registration plate or else a special permit at a cost of $7.50.

In my opinion, it was to avoid this double tax and *for no other purpose* that sub-paragraph 2 was placed in the statute. I do not think that it was the intention of the 1935

legislature in enacting Chapter 56 to broaden or extend [fol. 42] the use of demonstration plates so as to permit the caravaning of motor vehicles simply by attaching such plates. If this had been the intention of the legislature it would, in my opinion, have resulted in the violation of Section 18, Article IV, New Mexico Constitution, which provides that

"no law shall be revised or amended or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended, or *extended* shall be set out in full."

It should be presumed that the legislature did not intend to enact an unconstitutional statute and such a construction should be avoided if possible.

In view of the foregoing it is my opinion that the correct interpretation of sub-paragraph 2 above quoted is that persons transporting motor vehicles over the highways of this state on their own wheels 'for the purpose of selling or offering the same for sale, etc.' need not procure the ordinary license plates or a special permit when and only when:

1. Such vehicle is owned by an automobile dealer.

2. Such automobile dealer has paid the registration fee of $50.00 required by Section 11-330, 1929 Compilation.

3. There is attached to such vehicle a dealer's license plate duly issued under the provisions of Section 11-330, 1929 Compilation, and,

4. Such vehicle is being '*used for demonstration only and not for hire or private use*' and not caravaning.

Trusting that the above answers your inquiry, I am
Very truly yours, Quincy D. Adams, Asst. Atty. Gen."

QDA—OR.

[fol. 43] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed November 30, 1935

This cause came on for final hearing at Albuquerque, New Mexico, on September 13, 1935. A written stipulation of

facts was filed and in addition thereto testimony was submitted. Predicated upon such stipulation and such testimony and in compliance with Equity Rule 70½, we make the following findings of fact:

1. The stipulation is adopted and all the facts recited therein are found to be true to the same extent and for all intents and purposes as though repeated at length herein.

2. The highways of the state, including that over which plaintiff causes his automobiles to be driven, are used regularly by the general public with motor vehicles of all kinds. The manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; it increases the hazards incurred by the general public in such use and in that manner affects the safety and public welfare; and it increases the burden and expense of policing the highways.

3. The transportation of plaintiff's automobiles, particularly in units of two cars coupled together by the use of tow-bars or other similar devices, causes peculiar wear and tear of the highways and increases the cost of their upkeep and maintenance.

4. In most instances persons driving plaintiff's automobiles across the state are not paid anything either as compensation for their services or as expenses; they drive the automobiles and bear their own expenses merely as a means [fol. 44] of securing transportation to California.

5. Plaintiff realizes a substantial profit from the conduct and operation of his business. The continued collection of the tax involved in this suit will reduce the profit by the sum of the tax, but it will not destroy the business nor compel plaintiff to discontinue it.

Done at Albuquerque, New Mexico, on this the 29th day of November, A. D. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

In United States District Court

Messrs. Herbert K. Greer and Oren Parmenter, Attorneys for plaintiff E. M. Piper.

Messrs. Geo. E. Remley, Ralph P. Pierson and Samuel P. Block, Attorneys for plaintiff Howard Morf.

Messrs. Frank H. Patton, Attorney General; Quincy D. Adams, Assistant Attorney General; and E. R. Wright, Attorneys for the defendant.

Before Bratton, Circuit Judge, Neblett and Kennamer, District Judges

OPINION OF THE COURT—Filed November 30, 1935

Per CURIAM:

These cases were submitted together and may be decided [fol. 45] in like manner as they involve questions common to both. Plaintiff Piper resides in Dallas, Texas, and plaintiff Morf resides in Los Angeles, California. They are engaged separately in the business of purchasing used automobiles in Texas and adjacent states other than New Mexico, causing them to be transported in overland processions or caravans through the states of Texas, New Mexico and Arizona and into California and there selling them at wholesale to dealers in used automobiles. The object of each action is to restrain the defendant as Commissioner of Revenue of the State of New Mexico from enforcing collection of the tax provided in Chapter 56, Laws of New Mexico 1935. Both plaintiffs attack the validity of the statute charging that it is repugnant to the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States, and in addition plaintiff Morf asserts that it was repealed by Chapter 136 of the same legislative session.

The statute, in subdivision "d", forbids use of the highways of the state for the transportation of any motor vehicle on its own wheels for the purpose of sale either within or without the state which is not licensed by the state or owned and operated by a dealer duly licensed and operated under a dealer's license, without securing a special permit as therein authorized. The Commissioner of Revenue is then empowered to issue special permits upon payment of a fee of $7.50 for each single vehicle so transported and a fee of $5.00 for each vehicle towed or drawn by another. The pertinent part of the statute reads:

"No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any [fol. 46] motor vehicle on its own wheels for the purpose of

selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. * * *"

Plaintiffs are engaged exclusively in interstate commerce in the transportation of their automobiles, but it is settled [fol. 47] by repeated decisions that a state may lay upon operators of motor vehicles moving exclusively in interstate commerce a reasonable and non-discriminatory tax as compensation for the use of the highways and as a fair contribution to the cost of police regulation of traffic. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160; Clark v. Poor, 274 U. S. 554; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Interstate Transit Co. vs. Lindsey, 283 U. S. 183; Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285. That general doctrine is conceded, but plaintiffs say that the statute does not come within its boundaries because the tax imposed is unreasonable, arbitrary and discriminatory and bears no reasonable relation to the use made of the highways.

The automobiles transported by plaintiffs are moved in processions or caravans usually consisting of fourteen, sixteen or eighteen vehicles. Quite frequently they are in units of two coupled together by the use of tow-bars or other similar devices with no elasticity or play between them. The front car in the pair is operated by the driver and it pulls or draws the second one. There is no connection between the respective braking systems of the two. Both are controlled by that of the front car. It is obvious that the movement of automobiles in that manner and with the rear vision of the driver impaired by the second car, provides a substantially less measure of safety than does the operation of a single vehicle; and caravans of this nature present difficulty and other hazards to travelers. It is frequently difficult on overtaking such a caravan to pass it. Much delay, inconvenience and hazard is sometimes encountered. Moreover, there is a mechanic with each cara- [fol. 48] van and sometimes when one car or a unit of two cars has tire or mechanical trouble, all cars are stopped and that likewise causes traffic difficulty and hazard. And many of the persons who drive automobiles for plaintiffs are not employed regularly. They are not paid anything either as compensation for their services or for expenses. They bear their own expenses and drive the cars merely as a means of obtaining transportation to California. It may reasonably be inferred that they have scant interest in the business or the vehicle being driven and a minimum of regard for the safety of others using the highways. But that is not all. Due to the lack of elasticity or play between two vehicles attached by tow-bars or other like devices, the rear car skids, particularly in going around curves, and that causes peculiar wear and tear of the highways. Transportation of automobiles in that manner for sale is a new and distinct commercial business. It bears marked features of dissimilarity from other kinds of transportation. Manifestly the additional traffic hazards and the wear of the highways which it occasions cast a substantially heavier financial burden upon the state for maintenance and for the enforcement of police and safety measures.

It must be assumed that the legislature took all of these elements and perhaps others into consideration in fixing the license upon transportation of that kind; and a wide range of discretion must be accorded to the legislative power in dealing with the classification of businesses in-

cluding commercial transportation, and their subjection or regulation through an excise or license tax. The propriety of legislative action within the scope of police power is not for the determination of the courts. All such questions relate to policy and are remitted to the judgment of the legis- [fol. 49] lature whose decision must stand even though its wisdom is fairly debatable. The exercise of scientific precision in classification and the exaction of licenses or fees for the use of the highways is not essential to validity. Sproles v. Binford, 286 U. S. 374. A court is not free to substitute its judgment for that of the legislature in respect to the choice of expedients or merits between different methods of fixing such fees. Making concrete application of that abstract doctrine, the judgment of the legislature cannot be overthrown unless the license fee in question is manifestly unreasonable, arbitrary, capricious, or without any reasonable relation to the use of the highways. When the differentiating features of transportation of this kind are borne in mind with the increased hazards of traffic, the deleterious effect upon the highways and the heavier financial burden of upkeep and police regulations, we cannot say that the statute is open to the attack directed against it.

Next it is urged that the application of the statute to Plaintiffs constitutes a discrimination against interstate commerce. The argument is divided into several parts. Stress is laid upon the fact that plaintiffs use and traverse only about 165 miles of highway in crossing the state and are required to pay the tax for each car making the single trip; that the tax is disproportionately high when compared to that exacted of others and that a resident dealer may caravan automobiles into the state with his dealer's license plates attached and without payment of the tax provided in the statute under consideration. The fact that it is only 165 miles from the point at which vehicles transported by plaintiffs enter the state to the point at which they depart from it is not determinative. The license confers the right of transportation into or through the state [fol. 50] without regard to distance. Plaintiffs have the privilege of transporting their automobiles by a longer route without additional charge. Certainly the exaction of a flat charge for such transportation, instead of graduating it upon a mileage basis which conceivably could entail substantial administrative difficulty and expense, cannot be

said to constitute discrimination. Instead it comes well within the range of legislative discretion over which a court has no supervisory control. Neither can it be regarded as objectionable discrimination when contrasted with the graduated fees required of those who operate trucks and busses. The clear and distinctive differences between the characteristics of transporting vehicles in caravans with that of operating single trucks or busses are matters for the legislature to determine in fixing license fees and its determination of them cannot be disturbed unless the asserted discrimination is plain. The difference in kind or amount of the license fees here is not enough to call discrimination. The contention that there is discrimination in the fact that a resident dealer may caravan automobiles into the state with his dealer's plates attached and without payment of the tax provided in the statute under consideration rests upon an unfounded premise. A resident dealer may obtain a dealer's demonstration number. The annual fee of $50.00 entitles him to one pair of plates and he may secure additional plates upon payment of $10.00 for each paid. Sec. 11-330 Comp. 1929. But such plates may be used only for automobiles used exclusively for demonstration purposes. They may not be attached to automobiles which are caravaned into the state for other purposes. To illustrate, if a dealer should desire to caravan twenty automobiles into the state, only two of which are to be used for demonstration purposes, his dealers' plates may be attached to the two, but he would be required to pay the tax on the eighteen and secure a special permit in ac-
[fol. 51] cordance with the statute.

We come now to the contention that Chapter 56, supra, was repealed by Chapter 136 of the same session. The former was approved on February 21st; the latter on February 28th and it contains no provision expressly repealing the former act. It is unnecessary to suggest that repeal by implication is not favored and that both statutes should be construed together and in harmony with each other if that can be done without violating the plain language used or the manifest legislative intent. Chapter 56 is essentially substantive in character. It forbids the use of the highways for the transportation of automobiles for sale without payment of the fee and the securing of the special permit authorized therein. That is the major purpose of

the act. On the other hand the object of Chapter 136 is to facilitate greater efficiency in unified administration of the laws respecting the highways, including police regulations and taxes. That legislative objective is stated at length in the first section. After creating a Port of Entry Board composed of the State Highway Engineer, a member of the State Corporation Commission and the Commissioner of Revenue, authorizing the establishment of ports of entry into the state and elaborate procedure for the examination, registration and issuance of permits to motor vehicles for the transportation of passengers for hire or for the transportation of property which enter the state, a mileage tax from the point of entry to the point of destination, graduated on the basis of weight of vehicle and cargo, is levied. It is then textually provided that the tax shall not apply if the owner or operator elects to register the vehicle with the Bureau of Revenue and pay the fees required for the issuance of license plates. At the time that law was enacted there were two existent statutes with [fol. 52] respect to fees on automobiles. One provided for registration, payment of license fees and the issuance of license plates. It was clearly provided that both such fees and the mileage tax should not be exacted; that payment of such registration fees should render the owner or operator immune from payment of the mileage tax. The other was the statute in question which requires payment of the so-called caravan fee. No such provision is found against payment of that fee and the mileage tax at the same time. The care with which the legislature interdicted exaction of both in one instance and failed to do so in the other is significant. It indicates persuasively an intent in the latter instance to require both; in other words that the mileage tax shall supplement the flat fee. Thus there is no conflict between the two statutes. On the contrary, they are in harmony and operate together with respect to transportation of the kind involved here. And there is no obstacle to the imposition of different licenses and taxes by successive acts if together they are reasonable and non-discriminatory. Interstate Busses Corp. v. Blodgett, supra.

These are our conclusions of law. For the reasons indicated the bills will be dismissed for lack of equity.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed November 30, 1935

KENNAMER, District Judge, dissenting:

There can be no doubt that a state may lawfully exact of [fol. 53] interstate traffic a tax which bears a fair relation to the expense occasioned to such state by the presence of such traffic upon its highways.

There is also no doubt that the legislature of a state may make any reasonable classification of interstate traffic, for tax purposes, so long as the classification is defined by characteristics which bear some relation to the expense or hazard occasioned by the class.

Interstate traffic in motor vehicles may be the subject of such a classification. The constitutional limitation imposed upon the power of the legislature to levy taxes upon any such class is, that it must be in a sum which is a fair contribution to the cost of constructing and maintaining the highways, and of regulating traffic thereon.

In my opinion the statute in question, being subdivision d, of chapter 56, laws of New Mexico, 1935, does not accomplish a proper classification. An analysis of the statute discloses that the classification is defined by two limitations. The first is expressed in the following excerpt from the statute: "Any motor vehicle on its own wheels." The second dimension of the classification is as follows: "For the purpose of selling or offering the same for sale." Two characteristics, and only two, are necessary to render the vehicle subject to the tax. It must be moving on its own wheels and must be transported for the purpose of sale. Of the two restrictions upon the class the latter is the dominant.

Reduced to its substance the classification attempted is of vehicles being transported "for the purpose of sale" not of vehicles moving in integrated fleets which may, and doubtless do, occasion extra traffic hazards requiring unusual and expensive policing of the highways. The tax is levied alike upon vehicles moving in fleets and upon vehicles moving singly, so long as the same are goods seeking [fol. 54] their market; notwithstanding the evident fact that the single "purpose of sale" vehicle cannot conceiv-

ably cause the state a greater expense by wear to the highways and policing than the same vehicle will occasion in traversing the state in pursuit of other commercial enterprises not subject to the tax.

Some point is made of the fact that two vehicles moving in tandom, under the power of one only, cause greater damage to the roads than two vehicles moving separately, each under its own power. Further point is made of the increase in traffic hazard by reason of the transportation of vehicles in tandom, which is occasioned by the lack of integrated brake control. An examination of the taxing statute discloses the tandom practice of transportation to be encouraged rather than penalized in proportion to the increase in expense and hazard. Single vehicles, whether moving in fleets *are* not, are charged the flat rate of $7.50 per car. Vehicles in tandom (which the state contends to to be more dangerous and more damaging) are offered a discount of $2.50 upon the gross tax levied against the t-o automobiles. It is plain that the average charge per car decreases as the traffic hazard is emphasized by the transportation of vehicles in tandom. The statute actually offers a premium for the complication of the state's traffic problem.

I am strongly of the opinion that a proper tax classification of vehicles moving in integrated fleets for any purpose would be proper. The statutes in question do not accomplish such classification. Doubtless the State of New Mexico has power to regular- the number, the speed, and generally control the deliberate concentrations of traffic, whether in interstate commerce or not. The state may even require caravans to proceed under convoy, so long as the regulation reasonably relates to public safety or convenience. It follows that the state may exact of such traffic a [fol. 55] charge in excess of the charge upon other traffic to defray the expense of the additional service required of the state because of its class character. But when levied against interstate commerce the excess must be shown fairly to approximate a recoupment of an excess of expense occasioned to the state by reason of the peculiarities which form the basis of its classification.

I am of the opinion that the statute involved is invalid, in so far as the same relates to interstate commerce, and that the enforcement thereof should be enjoined.

In United States District Court

Decree Dissolving Temporary Injunction, Assessing Damages and Dismissing Bill of Complaint—Filed December 24, 1935

This cause having heretofore come on for final hearing on the bill of complaint herein praying for a decree enjoining and restraining the defendant, as Commissioner of Revenue of the State of New Mexico, from enforcing the provisions of Chapter 56 of the Session Laws of 1935 of the State of New Mexico, and the Judge of the above Court having called to his assistance to hear and determine this cause, the Hon. Sam G. Bratton, Judge of the Circuit Court of Appeals for the Tenth Circuit, and the Hon. Franklin E. Kennamer, Judge of the District Court of the United States for the Northern District of Oklahoma, pursuant to the provisions of Sec. 266 of the Judicial Code, and the said cause and the evidence therein having been heard before said three-Judges, and the cause having been argued by counsel thereupon, upon consideration thereof,

It is ordered, adjudged and decreed as follows:

[fol. 56] 1

That the temporary restraining order heretofore issued in this cause be and the same is hereby dissolved.

2

That the defendant's damages upon the bonds heretofore given in this cause, in accordance with the provisions of the temporary restraining order, be and they are hereby assessed at $4,825.00, as of the 18th day of December, 1935, and judgment for said damages in the amount aforesaid is hereby entered against the plaintiff and the United States Fidelity & Guaranty Company, a corporation, the surety of the plaintiff upon said bonds, with interest thereon at the rate of six (6) per cent per annum from the 18th day of December, 1935 until paid, and for the costs of this action to be taxed.

3

That the bill of complaint herein be and the same is hereby dismissed at plaintiff's costs.

For all of which let execution issue.

To all of which rulings the plaintiff excepts.

Dated at Santa Fe, New Mexico, this 24th day of December, A. D. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

OK. E. R. Wright.

OK. R. K. Pierson. Geo. E. Remley. J. R. Modrall, Asst. Atty. General.

[fol. 57] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 2789. Equity

HOWARD MORF, Doing Business Under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

JOHN D. BINGAMAN, Commissioner of Revenue for the State of New Mexico, Defendant

Bill of Exceptions—Filed February 10, 1936

APPEARANCES

Mr. George E. Remley, Santa Fe, New Mexico; Mr. Ralph K. Pierson, Compton, California; Mr. Samuel P. Block, Compton, California, Attorneys for Plaintiff, Howard Morf.

Mr. Frank H. Patton, Attorney General, Santa Fe, New Mexico; Mr. Quincy D. Adams, Assistant Attorney General, Santa Fe, New Mexico; Mr. E. R. Wright, Santa Fe, New Mexico, Attorneys for Defendant.

The following named Judges composed the statutory Three Judge Court, before which the above entitled cause was tried, to-wit:

Hon. Sam G. Bratton, Judge of the United States Circuit Court of Appeals for the Tenth Circuit,

Hon. F. E. Kennamer, Judge of the United States District Court for the Northern District of Oklahoma,

Hon. Colin Neblett, Judge of the United States District Court for the District of New Mexico.

[fol. 58] AGREEMENTS AS TO HEARING AND SUBMISSION

The court convened in Albuquerque, New Mexico at 2:00 P. M. on the 13th day of September, 1935. It was agreed in open court that Cause No. 2778 Equity and Cause No. 2789 Equity should be submitted together.

The plaintiff Howard Morf, doing business under the firm name and style Pacific Wholesale Automobile Company, in open court, proffered and was permitted to file in Cause No. 2789 Equity his amendment to his complaint, which said amendment was other, different from, and in addition to the amendment theretofore permitted to be made by interlineation, as shown in the record proper. Thereupon the defendant, having had no opportunity to file formal pleading to such amendment, it was in open court agreed that the hearing should proceed and stand as though issue had been joined upon the Bill of Complaint as so amended.

Thereupon the parties presented to the court written stipulation concerning certain facts, which said stipulation provided in substance that nothing therein contained should preclude either party from objecting to the admission in evidence of any facts so stipulated on the grounds of irrelevancy or immateriality.

It was agreed in open court that the filing of said stipulated facts should not preclude either party from calling witnesses to the stand and adducing other and further evidence and testimony from said witnesses.

It was thereupon agreed and stipulated in open court that the hearing upon the issues then joined, and upon the facts stipulated and to be adduced, should be final.

Thereupon the written stipulation of facts entered into between the plaintiff and the defendant was read to the court, which said stipulation is as follows

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[fol. 59] STIPULATION OF FACTS

It is hereby stipulated between the attorneys for Plaintiff and the Attorney General, of the State of New Mexico, representing the defendant, that for the purpose of hearing and trial of the above entitled cause, Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, Plaintiff, vs. John D. Bingaman,

Commissioner of Revenue for the State of New Mexico, Defendant, the following may be taken and considered by the Court as true:

I. That the plaintiff, Howard Morf, is a resident and citizen of the City and County of Los Angeles, State of California, and engaged in business under the name and style of Pacific Wholesale Automobile Company in said city, county and state aforesaid; that the defendant, John D. Bingaman, is the duly appointed and qualified Commissioner of Revenue for the State of New Mexico, and is a citizen and resident of the State of New Mexico.

II. That the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

III. That if the plaintiff should pay the demands made upon him for the payment of the registration fee provided for in Chapter 56 of the Session Laws of New Mexico, for the year 1935, he has no remedy at law for the recovery of the money so paid should it be determined that the application of Chapter 56, of the Session Laws of 1935, to the plaintiff is unconstitutional.

That there is no provision of law in New Mexico which permits the plaintiff to pay the fees required under said Chapter under protest and to recover the same by an action at law.

That Chapter 56 of the Session Laws of New Mexico, for the year 1935, is also property designated as House Bill No. 71.

IV. That if injunctive relief is not granted to the plaintiff restraining the enforcement of the provisions of Chapter 56, of the Session Laws of 1935, the defendant will proceed to the enforcement of the provisions of this statute as against the plaintiff and the effect of the enforcement of such provisions will be to prohibit plaintiffs operations [fol. 60] through the State of New Mexico, only and until the plaintiff complies with the provisions of said statute and pays the fees required thereby.

V. That due and timely notice of the filing and pendency of this cause was given to the Governor of the State of New Mexico.

VI. That the plaintiff is engaged in the business of purchasing new and used automobiles in various eastern and

southern states of the United States and driving, or causing the same to be driven on their own wheels over the public highways of the states where the said used automobiles are purchased and through the states of New Mexico, Arizona and California, and into the state of California, for the purpose of selling the same.

VII. That plaintiff does not sell, or offer for sale any of said cars within the State of New Mexico, and does not maintain any place of business therefor within the State of New Mexico.

VIII. That the used cars so handled by the plaintiff are acquired by the plaintiff in either the State of Texas or in some other state, other than the State of New Mexico, in the southern and southeastern part of the United States, and when transported over the highways of New Mexico, belong to and are the property of the plaintiff, and properly registered and licensed in other States, but are not registered or licensed in New Mexico.

IX. That the plaintiff, in transporting used motor vehicles through the State of New Mexico, and over the highways of the State of New Mexico, enters the State of New Mexico at Anthony, New Mexico, traveling over Highway No. 80 to Las Cruces, New Mexico, thence over Highway No. 80, through Lordsburg, New Mexico, and leaving New Mexico at Steins, a distance of one hundred and sixty-six miles, and said trip takes approximately seven hours.

X. That in transporting said used cars over the highways of the State of New Mexico, and through the State of New Mexico, said vehicles are customarily and ordinarily moved in processions or caravans, two cars being coupled together by the use of tow bars, or similar attachments, so that said cars are operated in tandem or in pairs, one car being operated by the driver and pulling another. That there is no connection between the braking system [fol. 61] on the lead car with the braking system on the car being towed.

XI. That that portion of U. S. Highway No. 80 between Anthony and Steins, New Mexico, carries traffic of such volume as is ordinarily found in sections that are sparsely populated; that said highway between Anthony, New Mexico, and Las Cruces, New Mexico, is a concrete, two-lane

roadway sixteen feet in width, plus three feet shoulders on each side.

XII. That the caravan fees collected by the State of New Mexico, from March 1st, 1935, to September 4, 1935, is approximately $40,000.00.

XIII. That from March 1, 1935, to June 30, 1935, fees under Chapter 56 of the Session Laws of 1935 were collected in the amount of approximately $33,500.00 and that during such period, fees were collected without the aid of the ports of entry.

XIV. That the total collections made by the ports of entry, from July 1st to September 4th, 1935, under the provisions of Chapter 136, Session Laws of 1935, amount to Thirteen Thousand Three Hundred Sixteen and 22/100 Dollars ($13,316.22) and during this period such fees were collected by the ports of entry.

XV. That the total expense of operating the ports of entry by the state of New Mexico, under the provisions of Chapter 136, Session Laws of 1935, from July 1st to August 31st, 1935, is Seven Thousand Fifty-two and 68/100 Dollars ($7052.68), but that said ports of entry are engaged in numerous duties other than enforcement of said law, and collecting fees thereunder.

XVI. That substantially all of the fees under Chapter 56 of the Session Laws of 1935 have been collected through the ports of entry since July 1st, 1935, which is the effective date of the establishment of the ports of entry, and that such ports of entry are the principal instrumentality relied upon by the State of New Mexico for the collection of such fees, subsequent to July 1, 1935, that collections were made under said law prior to that time without the establishment of ports of entry.

[fol. 62] XVII. That plaintiff has been engaged in the automobile business for more than three years and has made a livelihood thereby; that said business is worth more than $15,000.00.

XVIII. That plaintiff is engaged strictly in interstate commerce.

XIX. That it is necessary to plaintiff's business for him to transport his automobiles over Highway No. 80 in the

State of New Mexico, for a total distance of approximately 166 miles and that his fees under the provisions of said Chapter 56 amount to $7.50 per car if run separately, and if run in pairs, $12.50 per pair.

XX. That plaintiff is not engaged in the business of Common Carrier.

XXI. That the used car market in the State of Texas, and in states immediately adjacent and east of the State of Texas, is generally lower than the used car market in the State of California and upon the west coast of the United States, and that by reason thereof the value of the used cars handled by the plaintiff is generally lower in the areas in which plaintiff acquires said used cars than the value and market for such used car of identical make, model, quality and condition in the State of California, and generally, on the west coast of the United States.

XXII. That the distance from the points of purchase, over the public highways of the states of New Mexico, Arizona and California, to Los Angeles, in the state of California, where the re-sale of the plaintiff's said vehicles occurs, exceeds one thousand miles.

XXIII. That the motive power and the brakes on the lead car were originally designed to propel or restrain only one vehicle; that the customary operation of the plaintiff places the heavier car as the towing car, and that all cars are inspected and the brakes, motor and lights are inspected and adjusted before leaving Dallas.

XXIV. That customarily the towing car does not have any rear view mirror on the driver's side of the car outside of the car.

[fol. 63] XXV. That the freight rate for transporting said used cars from Dallas, Texas, to Los Angeles, California, by rail is $4.55 per hundred-weight, and that the aggregate cost to transport said motor vehicles from Dallas, Texas, to Los Angeles, California, by rail exceeds $100 to $120 for the average automobile so transported, and that the rate for the transportation of automobiles by railroad from the most practicable point immediately east or south of the state border line of the State of New Mexico, to the most practicable point immediately west of the border line

of the State of New Mexico, is $1.00 per hundred-weight; that the cost of transporting used cars through New Mexico over the highways of New Mexico, in the manner employed by the plaintiff, will not exceed the sum of $7.00 per car, exclusive of the license fees complained of herein; that the aggregate cost of such movement from Dallas, Texas, to Los Angeles, California, does not exceed an average of $50.00 per car, exclusive of the license fees.

XXVI. That the caravan fees collected by the State of New Mexico, through its port of entry, from July 1st to August 31st, 1935, amount to Three Thousand Five Hundred Sixty-five Dollars ($3565.00).

XXVII. That the plaintiff has caravaned used cars through the State of New Mexico from August 23, 1935, to September 11, 1935, upon which there is due to the State of New Mexico, if the statute herein is sustained, fees to the approximate amount of $168.75. That plaintiff has paid to the State of New Mexico for cars driven over Highway #80 in the State of New Mexico, between March 6, 1935 and August 23, 1935, the sum of $4,418.75.

That the fee of $7.50 defendant compels plaintiff to pay on each car when driven alone, or leading another car, is equal to a charge slightly in excess of 4¢ per mile; that the fee of $5.00 defendant compels plaintiff to pay on each car when being towed amounts to approximately 3¢ per mile. These figures are based upon the distance of 166 miles from Anthony, New Mexico, to Steins, New Mexico.

[fol. 64] XXVIII. That the total collections made by the ports of entry, from July 1st to September 4th, 1935, under the provisions of Chapter 136, Session Laws of 1935, amount to Thirteen Thousand Three Hundred Sixteen and 22/100 Dollars ($13,316.22).

XXIX. That the total expense of operating the ports of entry by the State of New Mexico, under the provisions of Chapter 136, Session Laws of 1935, from July 1st to August 31st, 1935, is Seven Thousand Fifty-two and 68/100 Dollars ($7,052.68).

XXX. That the State of New Mexico has an area of approximately two hundred thousand square miles, with a population of less than five hundred thousand; that the assessed valuation of property subject to ad varolem taxes

in the State of New Mexico is less than Two Hundred Eighty-five Million Dollars ($285,000,000.00).

XXXI. That the annual appropriation for maintaining the New Mexico State Police is One Hundred and Five Thousand Dollars ($105,000.00), provided that the appropriations made for the maintenance of the State Police shall be paid out of revenues made available to the Commissioner of Revenue for the performance of his duties and allocated to this Department (New Mexico State Police) by the State Board of Finance, and that expenditures shall be made upon detailed budget estimates prepared annually subject to the approval of said Board. That said State Police are engaged in many other duties and perform many other services for the State of New Mexico.

XXXII. That the highways of the State of New Mexico have been acquired by and built, and are maintained by the State of New Mexico at the expense of the State of New Mexico, with the addition of certain contributions in the form of Federal Aid, and that the aggregate cost of such highway system is in excess of Eighty-five Million Dollars ($85,000,000.00) to the end of the fiscal year 1934, and that of said $85,000,000.00, Thirty Million Dollars ($30,000,000.00) have been contributed by the Federal government, leaving a net amount furnished by the State of New Mexico of fifty-five Million Seven Hundred Twenty-three Thousand Dollars ($55,723,000.00); that the aggregate cost of maintaining such highways averaged over a period of ten (10) years is One Million One Hundred [fol. 65] Twenty-five Thousand Dollars ($1,125,000.00) per year; that the budgeted maintenance for the current fiscal year beginning July 1, 1935, is One Million One Hundred Twenty-five Thousand Dollars ($1,125,000.00).

XXXIII. That the highway from Anthony, New Mexico, to Las Cruces, New Mexico, is of concrete construction; that the highway from Las Cruces through Deming, Lordsburg and Steins is oiled surfaced highway; that from Steins to the State line some three (3) miles is gravel; that the cost of constructing this highway from Anthony to Rodeo, being a point which is some thirty-two (32) miles beyond and south of Steins, is $2,536,283.41, of which amount the Federal Government contributed $1,324,878.07, and the cost paid by the State was $1,211,405.34; that the con[illegible]te por-

tion of said road was constructed about 1922; that the oiled road from Las Cruces to Deming was constructed about 1929; that the balance of said road has been constructed within the last two (2) years; that the maintenance of said highway for the fiscal year ending June 30, 1935, was $26,500.00 for a mileage of One Hundred Ninety-three (193) miles.

XXXIV. That for the fiscal year ending June 30, 1934, the revenues received by the Highway Department included Three Hundred Thirty-five Thousand Dollars ($335,000.00) motor vehicle taxes, Two and One-half Million Dollars ($2,500,000.00) gasoline taxes, Sixty-eight Thousand Dollars ($68,000.00) property taxes, One and One-half Million Dollars ($1,500,000.00) gasoline debentures, Five and One-half Million Dollars ($5,500,000.00) Federal Aid funds.

XXXV. That the State Highway Commission has jurisdiction over State Highways only, and these expenditures and costs mentioned in the preceding paragraph relate only to the State Highway system as distinguished from the county roads which are maintained by the counties through an ad valorem tax on property.

XXXVI. That the Attorney General's opinion attached to the Answer as Exhibit "A" was rendered by the Attorney General to the Commissioner of Revenue on September 6, 1935.

[fol. 66] XXXVII. That in addition to the foregoing facts, and in the consideration and determination of the questions of law involved herein, the Court may consider any and all other facts of which it may properly take judicial knowledge, and nothing herein contained shall prevent any party hereto from submitting other or additional pertinent or material facts not contradictory to the facts herein stipulated.

XXXVIII. That by nothing herein contained does any party hereto agree that all of the facts herein stipulated are relevant or material, and the right to object to any facts so stipulated on the ground of irrelevancy or immateriality is hereby reserved.

XXXIX. That upon the facts as herein stipulated, or otherwise established by evidence, the Court shall render

such judgment and grant such relief as shall be just and proper under the Constitution and the laws of the United States and the Constitution and the laws of the State of New Mexico.

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO ADMISSION OF CERTAIN FACTS

Whereupon the plaintiff Morf objected and excepted to the admission of the facts set out in paragraphs of said stipulation numbered XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV and XXXVII, for the stated reasons that they are wholly immaterial in that they can have no bearing or effect upon:

(1) The question of the constitutionality of the Caravan statute (Chapter 56 of the New Mexico Session Laws of 1935) attacked under the issues presented herein;

(2) The question of the repeal of said statute;

(3) The question of the construction, operation, or effect of said statute;

(4) The question of the validity of the acts of the defendant under the apparent authority of said statute, which acts are herein complained of.

[fol. 67] Whereupon the plaintiff MORF, being first duly sworn, testified as follows:

My name is Howard Morf. I am engaged in the automobile business in the City of Los Angeles, California. In my business I purchase second hand passenger automobiles, no trucks, in other states, and drive them into California for sale. In so doing I enter the State of New Mexico at Anthony and leave it at Steins over Highway No. 80. Approximately 80% of the cars I purchase are models of the years 1934 and 1935. Possibly 5% are models of years earlier than 1932. All cars have rubber tires thereon. I transport neither property nor persons in these automobiles for hire, and the only purpose in driving through New Mexico is for sale in California. No automobile so transported exceeds five thousand pounds in weight. During the three years of my operations I have had no accident nor

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have any of my drivers been arrested in New Mexico or any other state. I do not advertise in any way for drivers for my cars.

My methods of transportation through New Mexico are as follows: Every caravan has two or three of my regular employees who are paid a monthly salary or are paid a percentage of the profit. In every caravan there are three or four of my people who make it a business of driving caravan automobiles and hire out to me for that purpose. Sometimes business houses in Los Angeles recommend to me a person who happens to be in the east and desires to return to California by driving a car for me but this number is comparatively small.

Then, in response to questions propounded the witness by Judges Kennamer and Bratton, the witness continued: I am very positive my drivers do not pick up passengers along the road or charge them. My drivers are paid by the buyer or head man in charge of the caravan. To some he pays one dollar a day and expenses and to some two dollars. I pay some five or six colored boys from ten, twelve to fifteen dollars per month. There are some drivers, but not a great many, who receive a very small remun- [fol. 68] eration and their expenses and transportation. In order to get them back to Dallas from California, I send six or seven of them back in a seven passenger car. I pay them nothing at all for that trip except possibly expenses.

The judges having concluded, in response to questions by counsel, the witness continued: I buy cars from wholesale dealers mostly, in Arkansas and Texas or through men who are out buying cars for me on commission. I never hook more than two cars together. When this is done there are in most instances two drivers. Approximately twenty to twenty-five per cent of my cars are driven through New Mexico singly; that is, not hooked to any other car. All automobiles taken through New Mexico by me bear the registration plate of the state in which they were purchased, but none bear New Mexico license plates.

On cross-examination:

In my operations through New Mexico I carry no passengers or property for hire. In driving through New Mexico I do tie two cars together, but I have a greater number of single cars passing through the state than does Mr. Piper.

FIDEL GONZALES, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

My name is Fidel Gonzales and I am a member of the State Police, presently located at Las Cruces, New Mexico, where I have been for about fourteen months. I do not know Mr. Morf, but I am familiar with the type of operation of cars through New Mexico known as the auto caravan. I would say this type of operation increases our duties in regulating motor traffic. Possibly twenty-five per cent of our time is consumed in handling and regulating this type of traffic. Traffic accidents have increased since the caravaning of automobiles began. They drive too close to-
[fol. 69] gether. It makes it difficult for others to pass and they don't keep their lights up in shape. We have warned the drivers at times but have never arrested any of them. I have never seen any side mirrors used on the cars. When the two cars are tied together I have noticed when they go around a curve the back car skids. This also applies to Morf's cars. Sometimes the whole caravan stops when car trouble develops. We have inspected these caravans for stolen cars and always try to get their registration, check the lights, motor number and serial number. The drivers are sometimes women, men and sometimes boys. The caravans sometimes stop in New Mexico over night, and sometimes two or three of the drivers stop at a tourist camp while the rest of them sleep in the cars.

On cross-examination:

I would not say that accidents on the whole have increased this year than over the same period last year. Sometimes when we stop the drivers they say they are tickled to death to get some sleep. They did not sleep the day before. I do not know whether accidents all over the state have increased and have been increasing each year.

The front wheels of the towed car are free. I have seen some of Mr. Morf's hook-ups skid around a curve and have warned some of his men.

As a State Police officer it would be my duty to arrest reckless drivers, but I have made no arrests of drivers of Mr. Morf's caravans, nor have I arrested them for failure to have legal lights, but I have made them fix these lights at times. Notwithstanding these automobiles bear a placard issued by the Port of Entry officials, I have stopped

them and checked the same automobiles already checked at the Port of Entry. In all of the caravans going through the state, I believe I have arrested two drivers only.

[fol. 70] Redirect examination:

The speed of the caravans varies according to the drivers. Some will drive around forty-five and fifty miles per hour perhaps.

Recross-examination:

There are no speed laws in New Mexico. I have not felt called upon to make arrests for reckless driving.

ORDER AS TO BRIEFS

Whereupon the court granted to the plaintiffs five days within which to prepare briefs, the defendants five days thereafter, and the plaintiffs five days thereafter in which to file reply briefs. It was agreed in open court that the order of court might be signed without the court reassembling.

Whereupon the court closed the hearing and adjourned.

Thereafter and on to-wit the 18th day of December, 1935, the court having filed herein its opinion and findings of fact, the plaintiff Morf filed herein his objections and exceptions to the court's findings of fact, in the following words, to-wit:

[fol. 71] OBJECTIONS AND EXCEPTIONS TO THE COURT'S FINDINGS OF FACT

The court having made its findings of fact herein, now comes the plaintiff, before the entry of judgment in the above entitled cause, and objects and excepts to the court's findings of fact, and as grounds for such objections assigns the following reasons, to-wit:

I

The plaintiff objects and excepts to the court's findings of fact number I wherein it adopts as true all of the facts recited in the stipulation concerning said facts heretofore filed for the following reasons:

(a) That it is provided in said stipulation "that by nothing herein contained does any party hereto agree that all of the facts herein stipulated are relevant or material, and that the right to object to any facts so stipulated on the ground of irrelevancy or immateriality is hereby reserved."

(b) For each and every of the reasons stated in plaintiff's objection to the admission in evidence of the facts stipulated, which objection was filed with the Clerk of said court on the 17th day of September, 1935:

II

Plaintiff objects and excepts to the following portion of the court's finding Number II, to-wit:

[fol. 72] "The manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; it increases the hazards incurred by the general public in such use, and in that manner affects the safety and public welfare; and it increases the burden and expense of policing the highways."

for the reason:

(a) That such portion of said finding is contrary to and is not supported by the evidence adduced at the trial of this cause.

(b) That the statute under which the defendant is extorting fees and payment from the plaintiff, to-wit, Chapter 56 of the 1935 Session Laws of the State of New Mexico, does not purport to be and is not in fact a police measure to regulate the use of the highways of the State of New Mexico or to promote the public safety and welfare, and said finding is therefore immaterial.

III

Plaintiff objects and excepts to the court's finding of fact numbered III on the following grounds and reasons, to-wit:

(a) That said finding is not supported by the evidence adduced at the trial of this cause.

(b) That said finding ignores the fact that a large percentage of plaintiff's automobiles are transported over the

public highways of the State of New Mexico singly, and without any car being towed thereby.

IV

Plaintiff objects and excepts to the court's finding of fact Number IV upon the following grounds and for the following reasons:

(a) That such finding is contrary to and is not supported by evidence adduced in the trial of this cause.

(b) That such finding is wholly immaterial under the issues in this cause joined.

[fol. 73] V

Plaintiff objects and excepts to the court's finding of fact Number V upon the reason that the same is not supported by any evidence adduced in the trial of this cause.

[fol. 74] In United States District Court

[Title omitted]

Stipulation re Settlement of Bill of Exceptions

It is hereby stipulated by and between said plaintiff and said defendant, each acting through his respective attorneys of record herein, that the above and foregoing seventeen pages constitute a true statement of such of the evidence adduced in the trial of the above entitled cause and of such of the proceedings had in said cause, other than the record proper, as is sufficient and essential to the decision of the questions presented by the appeal to the Supreme Court of the United States from the judgment entered in this cause; and it is further stipulated that the foregoing statement with this stipulation attached may be settled, signed and sealed by the three judges presiding at the trial of this cause, as and for said plaintiff's bill of exceptions, without further notice to said defendant or his attorneys, without the necessity of said court being reconvened and at any time and place said judges may elect.

Dated this 1st day of February, 1936.

Geo. E. Remley, Attorney for Plaintiff, Santa Fe, New Mexico. Quincy D. Adams, Assistant Attorney General of the State of New Mexico, and Attorney for said Defendant.

[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The plaintiff and defendant acting through their respective attorneys of record herein, having filed with the clerk of this court in this cause their written stipulation that the above and foregoing statement in narrative form with said stipulation attached may be settled, signed and sealed by the three judges presiding at the trial of said cause, as and for said plaintiff's bill of exceptions,

Now, therefore, we, the judges before whom said cause was tried, and within the time permitted by rule of court, do hereby allow, settle, sign and seal the attached and foregoing, consisting of eighteen pages of typewritten matter, as and for said plaintiff's bill of exceptions in his appeal from the judgment herein entered to the Supreme Court of the United States, and do hereby order that the same be filed as and for a part of the record in this cause on said appeal.

Dated this 5th day of February, 1936.

Sam G. Bratton, Judge of the United States Circuit Court of Appeals, Tenth Circuit. F. E. Kennamer, United States District Court Judge for the Northern District of Oklahoma. Colin Neblett, United States District Court Judge for the District of New Mexico.

[fol. 76] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed December 24, 1935

Comes now Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, plaintiff in the above entitled cause, by and through his attorneys, Ralph K. Pierson and Samuel P. Block, of Compton, California, and George E. Remley of Santa Fe, New Mexico, and feeling himself aggrieved by the decree entered in said cause on the 24th day of Dec. 1935, dissolving the temporary restraining order theretofore issued in this cause, assessing defendant's damages by him sustained by reason of said restraining order, and dismissing plaintiff's

bill of complaint at plaintiff's costs, hereby prays that he be allowed an appeal from said decree to the Supreme Court of the United States, and in connection with his said petition said plaintiff herewith presents his assignment of errors and statement of jurisdiction.

Dated this 24th day of December, 1935.

Ralph K. Pierson, Compton, California.. Samuel P. Block, Compton, California. Geo. E. Remley, Santa Fe, New Mexico.

The appeal above prayed for is hereby allowed this 24th day of December, 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

[fol. 77] In United States District Court

Order Allowing Appeal and Granting Supersedeas—Filed December 24, 1935

The petition of Howard Morf, plaintiff in the above entitled cause for an appeal from the final decree dated December 24th, 1935, is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of $7500.00 with sufficient sureties, conditioned for the payment to the defendant of the damages assessed in said decree and the costs of this proceeding, in the event of the affirmance of the same, and further conditioned for the payment to the defendant of any additional damages which may accrue to the defendant pending the final determination of said appeal, the same shall operate as a supersedeas of the decree herein, and shall maintain the status quo of the parties hereto as the same existed prior to the entry of the decree herein, pending the final determination of said appeal; and

It is further ordered, that upon the filing of the bond hereinbefore provided for, and upon the approval of the same by the Clerk of the United States District Court for the District of New Mexico, the bonds heretobefore given by the plaintiff under the terms and provisions of the temporary restraining order issued in this cause shall be exonerated; and

It is further ordered, that upon showing made by the defendant that additional damages have accrued to the defendant during the pendency of said appeal which, together with the amount of damages assessed in said decree, have exhausted the penalty of said appeal bond herein provided for, then and in such event the plaintiff shall be required to give further and additional bond and to file the [fol. 78] same with the Clerk of the United States District Court for the District of New Mexico, conditioned as herein provided, and upon failure of the plaintiff to file such further and additional bond, conditioned as hereinbefore provided, within five (5) days after notice and demand made therefor, the provisions of this order preserving the status quo pending appeal shall be terminated and the defendant entitled to proceed with the enforcement of the provisions of Chapter 56 of the Session Laws of 1935 of the State of New Mexico from said date, to the same effect as though the provisions of this order preserving the status quo pending the final determination of this cause had not been made.

Dated this 24th day of Dec. 1935.

Sam G. Bratton, Circuit Judge. Colin Neblett, District Judge. F. E. Kennamer, District Judge.

OK. E. R. Wright, J. R. Modrall, Asst. Atty. General. Geo. E. Remley. Ralph K. Pierson.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed December 24, 1935

Comes now the plaintiff, Howard Morf, doing business under the name and style of Pacific Wholesale Automobile Company, by his counsel, and in connection with his appeal, filed the following assignment of errors on which he will rely on his appeal to the Supreme Court of the United States from the final decree of the Three Judge District Court for the District of New Mexico, entered on the 24th [fol. 79] day of December, 1935.

I

The District Court erred in entering its decree of December 24th, 1935, and therein dismissing plaintiff's petition and denying to plaintiff a permanent injunction, perma-

nently enjoining the defendant, as Commissioner of Revenue of the State of New Mexico, from enforcing as against plaintiff, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of New Mexico.

II

The District Court, by the entry of its decree, erred in denying to the plaintiff the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

III

The District Court by the entry of its decree, erred in permitting this plaintiff to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

IV

The District Court, by the entry of its decree, erred in denying to this plaintiff his rights under and the protection of the Interstate Commerce Clause of Section 8 of Article I of the Constitution of the United States.

V

The District Court, by the entry of its decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to said plaintiff in his interstate commerce, was not repealed by Chapter 136 of the 1935 Session laws of [fols. 80-88] said state.

VI

The District Court erred in making its finding of fact number 1 over the plaintiff's written objections and exceptions to the admissibility of certain of the stipulated facts, which objections and exceptions were filed herein on the 17th day of September, 1935.

VII

The District Court erred in making its findings of fact Numbers 2, 3, 4 and 5, over plaintiff's written objections and exceptions thereto, which said objections and exceptions were filed herein on the 18th day of December, 1935.

VIII

The District Court erred in entering its said decree upon the insufficient findings of fact by it made in this cause.

Wherefore, appellant prays that the said decree of the said District Court be reversed and for further and adequate relief in the premises.

Ralph K. Pierson, Compton, California; Samuel P. Block, Compton, California; Geo. E. Remley, Santa Fe, New Mexico, Attorneys for Appellant.

[fol. 89] In United States District Court

Praecipe for Record on Appeal, With Acknowledgment of Service—Filed December 24, 1935

To the Clerk of the District Court of the United States for the District of New Mexico:

For the purpose of a complete record on appeal in the foregoing case, please prepare, certify and transmit to the Sureme Court of the United States the following from the files and records of your court

1. Bill of Complaint and Amendments thereto.
2. Stipulation for Issuance of Temporary Restraining Order.
3. Restraining Order and Rule to Show Cause and Subpoena.
4. Acceptance of Service of Subpoena and Entry of Appearance by the defendant.
5. Return to Rule to Show Cause and Answer of Defendant.
6. Stipulation for Amendment by Interlineation in the Bill of Complaint.
7. Stipulation of Facts.
8. Plaintiff's Objections to the Admission in Evidence of certain of the Stipulated Facts.
9. Findings of Fact by the Court.
10. Decree.
11. Bill of Exceptions assigned, settled and sealed by the Court.
12. Petition for Appeal.

13. Order of Court Allowing Appeal and Granting Supersedeas.

[fol. 90] 14. Assignment of Errors.

15. Statement of Jurisdiction.

16. Defendant's Acknowledgment of Service of Copies of the Petition for Appeal, Order Allowing Appeal, Assignment of Errors and of Statement as to Jurisdiction.

17. Waiver of Citation.

18. Certificate of Presiding Judge.

19. This Praecipe.

20. Citation on appeal.

Ralph K. Pierson, Compton California. Samuel P. Block, Compton, California. Geo. E. Remley, Santa Fe, New Mexico.

IN UNITED STATES DISTRICT COURT

WAIVER OF ISSUANCE AND SERVICE OF CITATION

The issuance and service of the citation to appear in the Supreme Court of the United States in the above entitled case is hereby waived and receipt of a copy of the plaintiff's præcipe for the record is hereby acknowledged this 24th day of December, 1935.

J. R. Modrall, Asst. Atty. General; E. R. Wright, Attorneys for Defendant.

[fol. 91] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 92] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 21, 1936

Comes now the Appellant, Howard Morf, doing business under the firm name and style Pacific Wholesale Automobile Company, and, in conformity with Paragraph Nine of Rule Thirteen, states the points upon which he intends to rely and designates the parts of the record to be printed by the Clerk, as follows, to-wit:

I

Statement of Points Relied Upon

1. The District Court erred in entering its decree of December 24th, 1935, and therein dismissing appellant's petition and denying to appellant a permanent injunction, permanently enjoining the appellee, as Commissioner of revenue of the State of New Mexico, from enforcing against said appellant, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of the State of New Mexico.

2. The District Court, by the entry of its said decree, erred in denying to the appellant the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

3. The District Court, by the entry of its said decree, erred in permitting this Appellant to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

4. The District Court, by the entry of its said decree, erred in denying to this Appellant his rights under and [fol. 93] the protection of the Interstate Commerce clause of Section 8 of Article I of the Constitution of the United States.

5. The District Court, by the entry of its said decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to said appellant in his interstate commorce, was not repealed by Chapter 136 of the 1935 Session Laws of the State of New Mexico.

6. The Court erred in over-ruling appellants objections to the admission in evidence of the facts set out in paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV, XXXVII of the stipulation of facts, and thereafter adopting said stipulated facts so objected to, as facts of its own finding.

7. The District Court erred in making its finding of fact number 2, 3, 4 and 5, over appellant's written objections and exceptions thereto.

II

Designation of the Parts of the Record to be Printed by the Clerk

1. Citation on appeal with acknowledgment of service.
2. Bill of complaint and amendments thereto.
3. Stipulation for issuance of temporary restraining order.
4. Temporary restraining order and rule to show cause.
5. Subpœna.
6. Acceptance of service of subpœna and entry of ap-p--reance of defendant.
7. Return to rule to show cause and answer of defendant.
8. Findings of fact by the Court, opinion of the court and decree.
9. Bill of exceptions.
10. Petition for appeal and order allowing same.
11. Order of *of* Court allowing appeal and granting supersedeas.
12. Assignment of errors.
13. Defendant's acknowledgment of service of copies of petition for appeal, order allowing appeal, assignment of errors and of statement as to jurisdiction.
14. Præcipe for record on appeal.
15. Waiver of citation.

[fol. 94] Ralph K. Pierson, Samuel P. Block, Geo. E. Remley, Attorneys for Appellant. Harry S. Bowman, Of Counsel for Appellant.

Receipt of copy and service of the above and foregoing statement of points relied upon and designation of the parts of the record to be printed by the Clerk of the United States Supreme Court, is hereby acknowledged this 17th day of February, A. D. 1936.

Quincy D. Adams, Assistant Attorney General of the State of New Mexico and attorney for Appellee.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 40,326. New Mexico, D. C. U. S. Term No. 772. Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, appellant, vs. John D. Bingaman, Commissioner of Revenue for the State of New Mexico. Filed February 21, 1936. Term No. 772, O. T., 1935.